No. 83-2119

In The

Supreme Court of the United States

October Term, 1983

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, with respect to eligibility for attorney's fees pursuant to 42 U.S.C. Section 1988, the Dormant Commerce Clause is a constitutional provision allocating power between the federal and state governments rather than a provision "securing" any "rights, privileges or immunities" within the meaning of 42 U.S.C. Section 1983.

2. Whether the orders of the Eighth Circuit Court of Appeals denying Petitioner's claim to attorney's fees for services rendered on the prior appeal on the merits constitute a previous adjudication and preclude relitigation of its eligibility for other fees.

3. Whether, consistently with the Eleventh Amendment, attorney's fees may be awarded against a state in Dormant Commerce Clause cases absent any expression of intent by Congress to abrogate immunity.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff: Consolidated Freightways Corporation of Delaware.

Defendants: Raymond Kassel, Robert Rigler, L. Stanley Schoelerman, Don Gardner, Jules Busker, Allan Thoms, Barbara Dunn, William McGrath, Jon McCoy, Charles W. Larson, Col. Edward Dickinson, Richard C. Turner, and the Honorable Robert D. Ray.

Defendant Intervenor: Motor Club of Iowa.

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OPINIONS BELOW

The opinion of the Court of Appeals is published at 730 F.2d 1139 (8th Cir. 1984). The District Court opinion is published at 556 F.Supp. 740 (S.D. Iowa 1983). Both opinions are reprinted in the Appendices to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8:

The Congress shall have Power . . . To regulate commerce . . . among the several states. . . .

United States Code, Title 42:

Section 1983:

"Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in Equity, or other proper proceeding or redress".

Section 1988:

"In any action or proceeding to enforce a provision of section(s) . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs."

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STATEMENT OF THE CASE

A. Procedural History.

The unusual and tangled history of this litigation must be recited in somewhat more detail than appears in the Petition for Certiorari. In July, 1978 Consolidated Freightways Corporation ("CF") filed suit in the Southern District of Iowa seeking to enjoin enforcement by Defendant officials ("Iowa") of § 321.457(6), Iowa Code

(1979), a statute which limited to 60 feet the length of twin-trailered vehicles which could operate on Iowa highways.

CF's Amended Complaint alleged jurisdiction under 28 U.S.C. §§ 1331, 1332, 1343, 2201 and 2202 and 42 U.S.C. § 1983. The Complaint pleaded causes of action for 1) placing undue burdens upon, and discriminating against, interstate commerce in violation of Art. 1, § 8 of the United States Constitution 2) violation of the Fourteenth Amendment and 3) violation of 42 U.S.C. § 1983. In addition to injunctive relief, CF prayed for reasonable attorney's fees. Iowa's Answer denied CF's jurisdictional allegations, denied that § 321.457(6) violated the Commerce Clause, the Fourteenth Amendment or 42 U.S.C. § 1983, and prayed the court to deny CF all relief requested.

Shortly before trial, on May 16, 1979, United States Magistrate R. E. Longstaff entered an Order granting CF's Motion to Bifurcate the claim for attorney's fees from other issues in the case. After an extensive trial, the District Court declared Iowa's length limitation unconstitutional in part and enjoined its enforcement on interstate highways. The District Court found that the Iowa length limitation did not discriminate against interstate commerce but that its application to interstate highways did constitute an undue burden upon commerce. *Consolidated Freightways v. Kassel,* 475 F.Supp. 544, 553 (S.D. Iowa 1979). No claim under the Fourteenth Amendment or § 1983 was discussed. Nor did the District Court make any explicit jurisdictional findings. Iowa appealed to the Eighth Circuit and sought a stay of the injunction. The Eighth Circuit denied the stay and ultimately affirmed

the ruling below. *Consolidated Freightways v. Kassel*, 612 F.2d 1064 (8th Cir. 1979).

At no time between the District Court's ruling and the conclusion of the initial appeal did CF pursue its claim to attorney's fees in the District Court. On December 21, 1979, shortly after the Eighth Circuit filed its opinion, however, CF filed a brief document entitled "Bill of Costs" requesting "costs under 42 U.S.C. § 1988", including "Attorney's fees" for the appeal in the amount of $41,911.00. CF did not accompany this Bill with a brief or memorandum attempting to support its eligibility for attorney's fees or request oral hearing. By letter to the Clerk, CF suggested judicial economy would be served by remand to the District Court, but did not file a motion seeking such relief.

Iowa filed a Resistance objecting "to any allowance of attorney's fees . . . under 42 U.S.C. & § 1988". On January 16, 1980, the Eighth Circuit entered an Order denying "the motion of appellee to tax disbursements and attorneys' fees . . ."

On January 25, 1980, CF filed a Motion to Vacate Order, requesting that the denial of fees by the Order of January 16, 1980, be vacated and CF's claim to fees be remanded to the District Court. CF did not request an enlargement upon nor an elaboration of the January 16 Order. Nor did CF request a "statement of reasons" for the denial of fees. CF now alleged that "§ 1983 and § 1988 are applicable" and filed a "Brief in Support of Motion to Vacate Order", which primarily relied upon *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823), for the proposition that the Privilege and Immunities Clause protects travel through a state for purposes

of trade. No authority suggesting that § 1983 reached all federal questions arising under the Commerce Clause was provided the Eighth Circuit.

Iowa again resisted, noting 1) that CF had selected its forum for determination of attorneys' fees on appeal, 2) that §§ 1983 and 1988 are not applicable, and 3) that the question of "special circumstances need not be addressed". On February 13, 1980, the Eighth Circuit denied CF's Motion to Vacate.

CF sought review of these orders by Petition for Certiorari filed April 15, 1980. The Petition was granted on April 6, 1981. CF limited its attack on the Eighth Circuit's orders denying fees to claimed failure to articulate a rationale or write an opinion. Iowa defended the orders on the merits by arguing that 42 U.S.C. § 1983, and therefore 42 U.S.C. § 1988, do not extend to Dormant Commerce Clause cases. After full briefing and oral argument, the Writ of Certiorari was "dismissed as improvidently granted" by this Court on February 23, 1982. 455 U.S. 329 (1982). Justice White dissented from the dismissal, noting that he would vote to affirm because, in his view, no formal opinion or statement of reasons for denying fees was required.

B. Rulings Below.

On March 24, 1982, CF filed a Motion for Partial Summary Judgment in the District Court seeking a ruling that it was entitled to recover from Iowa and Defendant-Intervenor Motor Club of Iowa its reasonable attorney's fees and expenses under 42 U.S.C. § 1988 for services performed in the District Court and the United States Supreme Court. CF did not seek to recover for services per-

formed in connection with the prior appeal to the Eighth Circuit. On May 24, 1982, Iowa filed a Cross-Motion for Summary Judgment seeking a ruling that CF was ineligible to recover attorney fees and expenses in this case under 42 U.S.C. § 1988. Iowa urged: 1) that the prior orders of the Eighth Circuit constituted a "previous adjudication" of CF's ineligibility for fees that precluded relitigation in the district court; 2) that, in any event, the Dormant Commerce Clause is not a constitutional provision "securing" any "rights, privileges or immunities" within the meaning of 42 U.S.C. § 1983 and CF is not, therefore, eligible for fees pursuant to 42 U.S.C. § 1988; and 3) that the Eleventh Amendment bars an award of attorney's fees against a state in Dormant Commerce Clause cases absent a congressional expression of intent to abrogate immunity. Motor Club of Iowa also moved for partial summary judgment on July 30, 1982.

After full briefing and oral argument, the District Court entered an Order on February 14, 1983, granting Iowa's motion for summary judgment. Judge Stuart rejected CF's argument that the Iowa truck length limitation violated due process and, therefore, held that this case could not be brought within § 1983 via the Fourteenth Amendment. And, after carefully canvassing relevant case law, the nature of the Commerce Clause, and the legislative history of § 1983, he concluded that the Commerce Clause does not secure rights cognizable under 42 U.S.C. § 1983. He did not reach Iowa's contentions that CF was precluded from relitigating its eligibility for attorneys' fees and that the Eleventh Amendment bars an award of fees under § 1988 in Commerce Clause cases.

The Eighth Circuit affirmed on the merits, not reaching Iowa's contention that CF was precluded from reliti-

gating its eligibility for attorney's fees or the Eleventh Amendment issue. The Court below concluded that the Dormant Commerce Clause does not secure rights cognizable under 42 U.S.C. § 1983 because it is a provision allocating power between state and nation rather than a provision securing individual rights against government. This conclusion was based upon a careful analysis of prior decisions of this Court; discussions of commentators; the language, legislative history and purpose of § 1983; and more than a century of practice by American lawyers.

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REASONS FOR DENYING THE WRIT

This case does not present any of the relevant considerations governing review on certiorari set forth in this Court's Rule 17. Contrary to the suggestion by CF, the decision of the Eighth Circuit neither conflicts with any decision of another federal court of appeals or of any state court of last resort, nor collides with prior pronouncements of this Court. The decision below does not merit review by this Court for any other reason.

CF suggests the decision below is in conflict with *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1975), *aff'd on other grounds*, 425 U.S. 463 (1976); and *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980). In *Kootenai*, an Indian tribe and certain of its individual members challenged Montana taxing schemes, partly on Commerce Clause grounds. After finding jurisdiction over the tribal claims under 28 U.S.C. § 1362, the three-judge district court, without analysis, went on to find that it had juris-

diction over the individual claims under § 1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under § 1983. This Court affirmed the lower court's jurisdictional holdings with regard to the tribal claims under § 1362, but found it unnecessary to determine the propriety of the district court's conclusion that jurisdiction over the individual claims existed under § 1343(3). 425 U.S. at 475, n.14. In a footnote, however, this Court did remind the district court that in further proceedings any claims which could only be pursued by the individual plaintiffs "must be properly grounded jurisdictionally. *See, e.g., Zahn v. International Paper Co.,* 414 U.S. 291, 294 (1973)." 425 U.S. at 469, n.7.

In *Kennecott,* the corporation sought to enjoin enforcement of New Jersey's Corporation Takeover Bid Disclosure Law primarily on the ground that it conflicted with the Williams Act, 15 U.S.C. § 78a, et seq. The defendants urged that the relief sought was barred by the Anti-Injunction Act, 28 U.S.C. § 2283. The Third Circuit found § 2283 inapplicable on *alternative* grounds, one of which was that "actions brought under § 1983, such as this case, are explicit exceptions to the Anti-Injunction Act". In a footnote, the Court asserted:

> The present action is properly brought under § 1983 because it seeks redress for deprivations of constitutional rights secured by the Commerce Clause and federal statutory rights protected by the Williams Act. *See Maine v. Thiboutot,* — U.S. —, 100 S.Ct. 2502, 65 L.Ed. 555 (1980).

637 F.2d at 186, n.5.

It is immediately apparent that neither case relied on by CF can be regarded as a considered holding by a

court of appeals contrary to the ruling below. This conclusion is confirmed by these courts' failure even to mention applicable decisions of this Court, *Connor v. Rivers,* 25 F.Supp. 937 (N.D. Ga. 1938), *aff'd,* 305 U.S. 576 (1939) and *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979).

In *Connor,* a three-judge court dismissed for want of jurisdiction a Commerce Clause challenge to an act requiring the licensing of photographers because the complaint did not allege the $3,000 in controversy necessary for federal question jurisdiction and because:

> While there is an allegation about the Georgia statutes' interfering with the Interstate Commerce, it is clear that there is no claim or evidence that said Georgia statute deprives the Petitioner 'of any right, privilege or immunity, secured by the Constitution of the United States. . . .'

25 F.Supp. at 938.

This Court summarily affirmed in a one-sentence per curiam opinion referring to the lack of the requisite jurisdictional amount. 305 U.S. at 576.

In *Chapman,* this Court upheld the argument that the Supremacy Clause of Art. VI, Section II, does not alone "secure" and is not itself a "right, privilege or immunity secured by the Constitution" stating:

> Thus, while we recognize that there is force to claimant's argument that the remedial purpose of the civil rights legislation supports an expansive interpretation of the phrase 'secured by the Constitution,' it would make little sense for Congress to have drafted that statute as it did if it intended to confer jurisdiction over every conceivable claim against a state agent. In order to give meaning to the entire statute

> as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3).

441 U.S. at 615.

The Supremacy Clause, like the Commerce Clause, structures the distribution of power between state and nation in our federal system. Neither clause expressly and generally limits the power of government over individuals. Thus, *Chapman* strongly supports the ruling below that, while 42 U.S.C. § 1983 reaches all constitutional claims arising under provisions of the Constitution limiting governmental power over individuals, it does not reach power-allocating provisions of the Constitution.

Without mentioning *Connor* or *Chapman*, CF places exclusive emphasis on language selected in isolation from early Commerce Clause decisions referring in passing to a constitutional right to engage in interstate commerce. As the Eighth Circuit correctly noted, however, the real focus of this Court's opinions in the Commerce Clause area has been upon the national interest in a free and efficient economy. Indeed, in this Court's opinion on the merits of this very case, it stressed preventing state regulation from "trespass[ing] upon national interests" and stated that Iowa's "regulations impair significantly the federal interest in efficient and safe interstate transportation. . . ." *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669, 671 (1981). This Court has certainly not suggested that the Commerce Clause protects "rights" in the sense of limiting governmental power over the individual.

Plainly, the ruling below does not conflict with any holding of this Court.

While Iowa believes that in one sense the decision below is an important one, and believes that it is clearly correct, even were the decision in error it does not involve the type of issue that requires immediate correction by this Court. At stake only is the matter of fee-shifting. Of course, the general American rule is that parties to litigation bear their own attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). No Commerce Clause plaintiff, before CF, to Iowa's knowledge, has even sought attorney's fees, much less been awarded them. Commerce Clause litigation can be expected to go on without fee-shifting. Just as they have done for over a century, firms seeking to vindicate the national interest in a free market may resort to 28 U.S.C. § 1331 and the established authority of the federal courts to enjoin the enforcement of unconstitutional statutes by state officials.

Even were the correctness of the ruling below a compelling subject for review by this Court, which it is not, this case does not present a suitable vehicle for resolution of the issue. The courts below need not have reached the merits because Iowa properly contended that CF's claim for attorney's fees is barred by the doctrines of collateral estoppel/issue preclusion and law of the case. CF's application to the District Court for attorney's fees for its work on the case at the District Court and Supreme Court levels (but not at the Eighth Circuit level) presented the same issue that the Eighth Circuit had considered in denying fees on the appeal. The issue was "actually litigated"

before the Eighth Circuit and was the subject of an express ruling. The judgment of the Eighth Circuit became absolutely "final" when this Court dismissed the Writ of Certiorari on February 23, 1982. All of the elements of issue preclusion are present and none of the recognized exceptions are applicable. CF has more than had its days in court and this interminable litigation should be brought to an end.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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